Failed consideration, and additional damages; a game of two halves.

Christopher Edwards

THE *GARTELL V YEOVIL TOWN* DECISION.

1. In Gartell & Son (a firm) v. Yeovil Town Football & Athletic Club Limited [2016] EWCA Civ 62, [2016] BLR 206, 164 ConLR 28, the Court of Appeal considered total failure of consideration in the context of a contract for work and materials. It held that:

   1.1. **What is the consideration that must fail?** When asking whether consideration has failed, the performance bargained for is not simply to provide *any* work and materials, but work done *with reasonable care and skill*.

   1.2. **On a total failure of consideration, can damages also be claimed?** Yes. However, the measure of those damages to the innocent party must take account of the price that he would have needed to pay the wrongdoer.

3PB'S ANALYSIS.

2. **The facts.** The claim arose out of the desire of Yeovil Town Football Club (**"the Club"**), at the time playing in League 1 of the Football League, to bring its main pitch at Huish Park and its training pitch at Alvington to the standard required by the Championship, the league above League 1.

3. The Club accordingly contracted with Gartell to carry out certain works, including top-dressing of the turf. Work did not go to plan because they were carried out in very wet conditions which were not conducive to the success of the treatment. Consequently, the Club refused to pay Gartell's invoice of £16,159.20.

4. **The claim and counterclaim.** Gartell brought a claim for the price, which the Club defended on the basis that Gartell had not carried out the contract with reasonable skill and care (in breach of the term implied by s.13 Supply of Goods and Services Act 1982). The Club counterclaimed for the remedial works required to reinstate the pitches (carried out by an entity called Ecosolve Limited, and costing £16,494), and overtime.

5. **The first instance decision.** At trial, HHJ Harington held that there had been a total failure of consideration on Gartell's part and, as a result, Gartell was not entitled to be paid. Further, the Club was entitled to recover the full cost of the remedial works undertaken by Ecosolve Ltd.

6. **Appeal issues.** Of the various grounds of appeal raised, the 2 main issues before the Court of Appeal were:

   6.1. Whether the judge was wrong to dismiss the claim on the basis of a total failure of consideration;

   6.2. If not, whether he was nonetheless wrong to award the Club damages in excess of what was required to restore the Club to the position it would have been absent the performance of the contract.

7. Gartell argued that since it had attended and carried out some works, there could not have been a total failure of consideration. It submitted that the correct test was whether it had "*performed any part of the contractual duties in respect of which payment was due*".[1]

8. **The Court of Appeal's decision.** Floyd L.J., giving the unanimous judgment of the Court, concluded that the judge had been right to conclude that there had been a total failure of consideration by Gartell. Whilst Gartell had carried out some work, this was not sufficient for there to be performance under the contract. What had been bargained for was work *carried out with reasonable care and skill* that was capable of improving the pitches (at [32]). Gartell had not performed to this level, and accordingly, the Club had received no part of the contractual performance which it had contracted for.

9. However, the judge had been wrong to go on and award the full cost of the treatment carried out by Ecosolve (at [33]). A finding of a total failure of consideration meant that the Club was discharged from its obligation to pay Gartell; but it was not then entitled to insist that Gartell pay for the full cost of renovation works, only the *additional* cost (*i.e.* above the contract price) of arranging for the same work contracted for to be done by someone else. Gartell could not be denied payment and then rendered liable for the entire cost of obtaining a

[1] Deriving from the judgment of Lord Goff in Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574 (HL) at 588.

substitute performance because "*the purchaser does not get the substitute goods for nothing*". Floyd LJ likened the case to a case for non-delivery of goods: on a non-delivery of goods the seller is not entitled to claim the price, and the buyer can claim the suffered damage of the additional amount he reasonably has to pay for the goods from another supplier.

10. Ultimately, the Court of Appeal declined to consider the quantum of the Club's counterclaim and substituted the judge's order with an order that both the claim and counterclaim be dismissed.

IMPACT OF THE DECISION

11. Because of the need to demonstrate that a failure of consideration has been 'total',[2] the question of what performance amounts to 'consideration' for this purpose has given rise to analytical problems. Whilst breaking little new ground, the Yeovil Town case provides a useful analysis for contracts for work and materials. The case is notable for:

    11.1. making it clear that one can purport to perform under a contract, but still do it so badly that there is a total failure of consideration; and

    11.2. re-iterating that, although additional damages can still be claimed, the innocent party must give credit for what he would have needed to pay in order to obtain the contractual performance in the first place.

12. Floyd L.J.'s analysis of the effect and rationale of total failure of consideration, might itself give rise to debate. The innocent party being "*discharged from its obligation to pay the price*" may be the correct analysis where there has been an accepted repudiation (perhaps Yeovil Town was such a case). But total failure of consideration is not usually thought to depend on repudiation, and in any event a repudiation does not discharge contractual rights that the wrongdoing party has unconditionally acquired. A better view, consistent with the authorities cited by the Court of Appeal, might be that the contractual trigger for payment (here, reaching substantial completion of the works) had not been reached.

25 April 2016

3PB's Business and Commercial Group are specialist commercial barristers that provide advice and legal representation on all aspects of business and commercial law. The Group advise on a broad range of issues, including contract and banking disputes, professional negligence, insolvency and international arbitration.

Christopher Edwards is a Commercial Law barrister who specialises in professional liability and commercial matters. To view his profile click here.

The Club was represented in the proceedings (in the Court of Appeal and below) by Graeme Sampson.

[2] See Stadlen J.'s extensive consideration of the point in Giedo Van Der Garde BV and another v Force India Formula One Team Ltd - [2010] EWHC 2373 (QB).